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IN THE MATTER OF THE APPLICATION  
OF ARIZONA WATER COMPANY, AN  
ARIZONA CORPORATION, TO EXTEND ITS  
EXISTING CERTIFICATE OF  
CONVENIENCE AND NECESSITY AT CASA  
GRANDE, PINAL COUNTY, ARIZONA

DOCKET NO. W-01445A-03-0559

RESPONSE IN SUPPORT OF  
CORNMAN TWEEDY 560, LLC'S  
CLOSING BRIEF

**I. INTRODUCTION.**

Cornman Tweedy 560, LLC, ("Cornman Tweedy") hereby files its Response ("Response") in support of its Closing Brief and in rebuttal of the Post-Hearing Memorandum of Arizona Water Company ("AWC"). For the reasons set forth in the Closing Brief and this Response, the Arizona Corporation Commission ("Commission") should deny AWC's request to extend the compliance deadline of Decision 66893 with respect to the real property owned by Cornman Tweedy that is located within the area conditionally approved in Decision 66893 (the "Cornman Tweedy Property").<sup>1</sup> The circumstances which existed on April 6, 2004, when the Commission issued Decision 66893 have changed substantially in the 30 months since that decision. The Commission's Utilities Division Staff ("Staff") acknowledges the changed circumstances with respect to the Cornman Tweedy Property, and supports Cornman Tweedy's request stating that even "[i]f the Commission grants AWC a time extension in this case, *it is Staff's position that the time extension should not include the Cornman Tweedy property.*" *Staff's Opening Brief* at 3, lines 10-11 (emphasis added). Staff's position on the Cornman

<sup>1</sup> The 1,138-acre Cornman Tweedy Property is highlighted in pink on Exhibit CT-1 attached to the Direct Testimony of Jim Poulos in this case. EJ Ranch is outlined in blue on Exhibit CT-1, and AWC's conditional extension area is outlined in orange. A copy of CT-1 is attached as Attachment "A" to this Response.

1 Tweedy Property is no doubt based upon the following reasons against granting the time  
2 extension that were articulated by Staff:

- 3 • *There is no planned development for the Cornman Tweedy Property at*  
4 *least for the next five years. Trans. at 309-310; Staff Opening Brief at 2-3.*
- 5 • *The current property owner, Cornman Tweedy, does not want to be*  
6 *served by AWC. Trans. at 309; Staff Opening Brief at 2.*
- 7 • *If there ever is development, the Cornman Tweedy Property can be*  
8 *served by someone other than AWC, and that would be Picacho Water*  
9 *Company. Trans. at 310; Staff Opening Brief at 3.*
- 10 • *If the Cornman Tweedy Property is served eventually by Picacho Water*  
11 *Sewer Company, it can also be provided sewer service by affiliate Picacho*  
12 *Sewer Company. Trans. at 310.*

13 AWC cannot refute the fact that circumstances have changed—which is the crux of this  
14 case—nor can it refute the reasons articulated by Staff for denying the extension of the deadline  
15 with respect to the Cornman Tweedy Property. Instead, AWC resorts to inflammatory hyperbole  
16 in its Post-Hearing Memorandum accusing Cornman Tweedy of secret maneuvers, conspiracy,  
17 subversion, expropriation and other nefarious conduct. The accusations of improper conduct and  
18 mischaracterizations leveled at Cornman Tweedy are unsupported by the record in this case, and  
19 are totally at odds with the established reputation of Jim Poulos and the several Robson-affiliated  
20 utility companies which he oversees in Arizona. Regarding the high caliber of utilities owned  
21 and operated by the Robson companies, Assistant Director Steve Olea testified as follows in a  
22 recent case involving AWC:

23 *Q. (By Staff attorney Sabo) And would it be your opinion that in terms of*  
24 *developer-managed water companies, Robson is sort of at the top of the*  
25 *list?*

26 *A. (Mr. Olea) There is a few companies I would put up there along with*  
27 *Arizona Water Company, and Robson's companies would be those also.*

28 *Reporter's Transcript of Proceedings, Vol. VII (August 4, 2005) at 1424, lines 17-22 (Docket Nos.*  
29 *W-04264A-04-0438, W-04265A-04-0439 and W-01445A-04-0755 (consolidated)) (the relevant*  
30 *excerpt of which is attached hereto as Attachment "B").*

The facts of this case are straight forward. Decision 66893 approved AWC's application

for a CC&N to serve 11 sections of land, including the 1,138-acre Cornman Tweedy Property, conditioned upon AWC satisfying two conditions within one year from the date of the decision: (1) filing of a certificate of assured water supply for each of Florence Country Estates and Post Ranch,<sup>2</sup> and (2) filing an executed main extension agreement for each of Florence Country Estates and Post Ranch. AWC failed to satisfy either condition of Decision 66893 for either development within the one-year deadline for compliance. As of this date, AWC has not satisfied either condition of Decision 66893 with respect to the Cornman Tweedy Property, and AWC has acknowledged that it cannot satisfy those conditions. AWC's ongoing inability to satisfy the conditions is not the fault of Cornman Tweedy as AWC asserts, but is the result of changed circumstances that necessitated the indefinite postponement of development of the property. Based upon the circumstances as they exist today, the Commission would not grant a CC&N to AWC for the Cornman Tweedy Property. Consistent with Staff's position in its Opening Brief, the Commission should not grant the requested extension of the compliance deadline with respect to the Cornman Tweedy Property.

II. **AWC'S REQUEST TO EXTEND THE COMPLIANCE DEADLINE WITH RESPECT TO THE CORNMAN TWEEDY PROPERTY SHOULD BE DENIED IN LIGHT OF THE UNCONTROVERTED CHANGED CIRCUMSTANCES PRESENTED IN THIS CASE.**

Cornman Tweedy identified several material changes in circumstances that support the denial of AWC's request to extend the compliance deadline with respect to the Cornman Tweedy Property. These material changes—which are uncontroverted by AWC in the record—include the following:

- Since the issuance of Decision 66893, Cornman Tweedy has acquired a contiguous 2,344-acre tract that will some day be developed as EJR Ranch. The 1,138-acre Cornman Tweedy Property that is included in AWC's conditional extension area is part of EJR Ranch.
- The prior owners of the 240-acre Florence Country Estates property (which represents only about 20% of the Cornman Tweedy Property) requested water service from AWC, but the current owner Cornman

<sup>2</sup> Florence Country Estates is a 240-acre parcel now owned by Cornman Tweedy and included in the Cornman Tweedy Property, and Post Ranch is a 480-acre parcel owned by Harvard Investments. *Decision 66893* at FOFs 11-12. Based upon requests for service for these two parcels, AWC filed the application which was approved in Decision 66893.

1 Tweedy opposes water service from AWC. The prior owners of the  
2 balance of the 1,138-acre Cornman Tweedy Property never requested  
water service from AWC.

- 3 • While the prior owners of the 240-acre Florence Country Estates property  
4 had plans to develop the property as one-acre lots, Cornman Tweedy never  
5 intended to use those plans and, in fact, shelved its own plans to develop  
6 EJR Ranch (including the former Florence Country Estates property) for  
five years or longer. As a result, there is no need for water service for the  
Cornman Tweedy Property.
- 7 • If AWC's requested extension of the compliance deadline is denied for the  
8 Cornman Tweedy Property, Cornman Tweedy or a successor owner can  
9 obtain water service in the future from AWC or Picacho Water Company.

10 *See Cornman Tweedy's Closing Brief* at 6-13. AWC does not refute these facts, but rather  
11 dismisses the significance of the changed circumstances, choosing instead to spin its conspiracy  
12 theory that Cornman Tweedy consciously acted to prevent AWC from meeting the conditions of  
13 Decision 66893, thereby preventing the vesting of AWC's right to serve the Cornman Tweedy  
14 Property. Not surprisingly, AWC's Post-Hearing Memorandum is an exercise in contradictions.  
15 For example, AWC argues that because Cornman Tweedy did not execute a main extension  
16 agreement prior to the April 6, 2005, deadline in Decision 66893, Cornman Tweedy somehow  
17 "secretly thwarted" its ability to fulfill that condition of the decision. *Post-Hearing Memorandum*  
18 at 9, lines 18-22. Yet, AWC freely acknowledges that delays in development are common,  
19 sometimes lasting years:

20 Commonly, developers do not sign main extension agreements, which obligate  
21 them to undertake large investments in infrastructure, until after their plats have  
22 been approved by the appropriate governing authority, and they are ready to begin  
23 installation of offsite improvements. [citation omitted]. Such approvals may not  
24 occur for several years after a request for service is received by Arizona Water  
25 Company. [citation omitted].

26 *Id.* at 6, lines 17-23. The evidence in this case is uncontroverted: Cornman Tweedy does not have  
27 an approved plat for the former Florence Country Estates Property, nor does Cornman Tweedy  
28 intend to finalize such a plat for at least five years. *Rebuttal Testimony of Jim Poulos* (July 6,  
2006) at 4-5. AWC acknowledges that absent an approved plat, it would be impossible to enter  
into a main extension agreement. *Garfield Direct Testimony* at 7-8; Trans. Vol. 1 at 63, 93. In

1 spite of that, AWC faults Cornman Tweedy for not executing a main extension agreement when it  
2 would be impossible for Cornman Tweedy to do so at this time. It should also be noted that the  
3 prior owners of the Florence Country Estates property received a draft main extension agreement  
4 from AWC shortly after October 9, 2003, but never responded to or executed the agreement.  
5 Post-Hearing Memorandum at 8, lines 22-26. However, unlike Cornman Tweedy, AWC has not  
6 attributed ulterior motives to the prior owners of Florence Country Estates. It should also be  
7 noted that AWC still does not have an executed main extension agreement with the developers of  
8 Post Ranch. *Post-Hearing Memorandum* at 8, lines 2-3.

9 While attempting to obscure and minimize the importance of changed circumstances in  
10 the Commission's analysis, AWC also attempts to impermissibly limit the scope of the  
11 Commission's review, arguing that:

12 Absent some changed circumstances impacting Arizona Water Company's fitness,  
13 willingness and ability to serve, ... Arizona Water Company's request for  
additional time should ... be granted as a matter of course."

14 *Post-Hearing Memorandum* at 17, lines 16-20. AWC provides no authority for this erroneous  
15 assertion, which is clearly contrary to Staff's statement on the issue:

16 Staff analyzes requests for extensions of time on a case-by-case basis because the  
17 reasons provided by the utilities for such requests are not always the same.  
18 However, some of the items that Staff considers include - is the reason for the  
19 delay out of the utility's control, how long has it been since the original decision  
was issued in the case, has the utility previously requested a time extension for the  
20 case, and have any circumstances changed since the case was previously  
analyzed.

21 *Staff Report* dated June 12, 2006, at 2 (emphasis added). On this latter point—changed  
22 circumstances—Staff explained its reasoning behind the deadlines for compliance included in  
23 Commission decisions:

24 The basic reason to require a time limit for the submission of both the developer's  
25 CAWS and the MXA is to help ensure that there is truly a necessity for the  
26 service being requested. Staff believes that if service is truly needed, the  
27 developer and the utility will at least begin taking steps to have that service  
28 provided by obtaining the State required permits within a reasonable amount of  
time.

1 *Id.* at 1. Certainly, the Commission does not unquestioningly grant extensions of deadlines "as a  
2 matter of course" as AWC would like, but bases its decision on a case-by-case analysis of the  
3 facts underlying the request. Changed circumstances need to be properly weighed in determining  
4 whether it serves the public interest to extend a particular deadline. In this case, neither the  
5 certificate of assured water supply or a main extension agreement have been provided for the  
6 Cornman Tweedy Property. Mr. Olea testified at the hearing that "the areas of a CC&N that  
7 should be deleted are those areas for which compliance is not achieved." *Trans. Vol. II* at 324,  
8 lines 15-17. Further, Cornman Tweedy has testified that the Cornman Tweedy Property will not  
9 be developed for at least five years. *Rebuttal Testimony of Jim Poulos* (July 6, 2006) at 4, lines  
10 15-21. Given these facts, it cannot be said that "there is truly a necessity for the service being  
11 requested." Try as it might, AWC cannot get over, under, or around this fact. It is not the result  
12 of any imagined conspiracy, but simply a material change in the circumstances pertaining to the  
13 development of the Cornman Tweedy Property.

14 A request to extend a compliance deadline should be denied if the Commission would not  
15 have granted the conditional CC&N under the facts as they exist today. The Commission would  
16 not grant a CC&N for the Cornman Tweedy Property today absent a showing of a need for  
17 service. Thus, AWC's request to extend the compliance deadline with respect to the Cornman  
18 Tweedy Property should be denied.

19 It should also be noted that AWC failed to address any of the case cited in Cornman  
20 Tweedy's Closing Brief where the Commission has excluded property from a requested extension  
21 area where there is no request for service. *See Cornman Tweedy's Closing Brief* at 14-16.

22 **III. THE COMMISSION MUST ACT IN THE PUBLIC INTEREST WHEN RULING**  
23 **ON A REQUEST TO EXTEND A COMPLIANCE DEADLINE OF A DECISION.**

24 In determining whether to grant or deny AWC's request to extend the compliance  
25 deadline, the Commission must of course act in the public interest. The single most important  
26 question in determining the public interest in this proceeding is whether there is a present need for  
27 water service in the conditional extension area and specifically, the Cornman Tweedy Property.  
28 Staff witness Steve Olea testified in this case as follows:

1 When Staff is considering either a new CC&N or an extension, one of the primary  
2 things we look at is the need. Because just by its name, it's a Certificate of  
3 Convenience and Necessity. The last word, necessity, is is there a need for this  
4 utility, you know, whether it be water, sewer, gas, whatever, is there a need for it  
5 to be there and serve that land.

6 \*\*\*

7 And also, as far as the actual convenience part of that term, is it in the public  
8 interest for them to be there. So the need is a major portion we'll look at.

9 *Trans. Vol. II* at 338, lines 21-25, and 339, lines 1-2 (emphasis added). The requirement of the  
10 need or necessity for water service is the very reason that the Commission includes time limits in  
11 conditional CC&Ns, such as the time limits included in Decision 66893. *See Staff Report* at 1  
12 (June 12, 2006). Without a need for service for the Cornman Tweedy Property, there is no public  
13 necessity to serve the same. Accordingly, Decision 66893 should exclude the Cornman Tweedy  
14 Property because it does not meet the public interest threshold.

#### 15 IV. REBUTTAL OF AWC ARGUMENTS.

##### 16 A. AWC ASKS THE COMMISSION TO RUBBER STAMP ITS REQUEST TO 17 EXTEND THE COMPLIANCE DEADLINE.

18 AWC argues that unless changed circumstances impact AWC's fitness, willingness and  
19 ability to serve, the Commission should grant its request for additional time "as a matter of  
20 course." *Post-Hearing Memorandum* at 17, lines 16-20. However, AWC provides no authority to  
21 support restricting the Commission's consideration of changed circumstances to only their impact  
22 on the fitness, willingness and ability to serve of the utility requesting the extension. AWC's  
23 assertion that the Commission should effectively rubber stamp its request to extend the  
24 compliance deadline in this case is directly contradicted by Mr. Olea's statement that "Staff  
25 analyzes requests for extensions of time on a case-by case basis because the reasons provided by  
26 the utilities for such requests are not always the same." *Staff Report* (June 12, 2006) at 2.  
27 Cornman Tweedy does not dispute that the Commission has often extended deadlines for  
28 compliance, but such extensions have only been granted after the Commission has satisfied itself  
that the public interest is served by the extension.

1 Mr. Olea writes that "[t]he basic reason to require a time limit for the submission of both  
2 the developer's CAWS and the MXA is to help ensure that there is truly a necessity for the service  
3 being requested." *Id.* at 1. Absent a showing of necessity, the public interest is not served by  
4 granting the extension. *See Trans. Vol. II* at 338, lines 21-25, and 339, lines 1-2 (...*is it in the*  
5 *public interest for them to be there. So the need is a major portion we'll look at*). AWC's  
6 assertion that it remains "ready, willing and able to provide water service" is irrelevant to this  
7 analysis, for it fails to address the critical question of necessity. *Post-Hearing Memorandum* at  
8 17, lines 11-12. The crux of this case is whether there exists today a necessity for water service  
9 on the Cornman Tweedy Property. Cornman Tweedy's testimony on this point is clear and  
10 uncontroverted in the record. The Cornman Tweedy Property will not be developed for five years  
11 or longer. *Rebuttal Testimony of Jim Poulos* (July 6, 2006) at 4-5. Based on the changed  
12 circumstances which exist in this case, the Commission should deny AWC's request to extend the  
13 compliance deadline with respect to the Cornman Tweedy Property.

14 AWC cites three Commission cases to support its argument that the Commission should  
15 approve its extension request, but none of the cases present the changed circumstances which exist  
16 in this case. In the first case involving Arizona Water Company (Decision 62754), AWC asked  
17 the Commission to approve the extension of a deadline for filing a copy of the developer's  
18 certificate of assured water supply for Saddlebrooke Ranch (Docket W-01445A-00-0017).  
19 AWC's selection of this case as an example is ironic, given that the developer of Saddlebrooke  
20 Ranch actually obtained a certificate of assured water supply well before the deadline for  
21 compliance but AWC simply failed to follow-up and request a copy of the certificate from the  
22 developer. Unaware that the certificate had been issued, AWC filed a Request to Comply with  
23 Filing Requirements, stating that "Robson Communities, the developer of the SaddleBrooke  
24 Ranch development, has informed the Company that, due to unexpected delays in planning and  
25 financing for its development, it will not be ready to proceed with development until at least early  
26 2006." *Request for Additional Time to Company with Filing Requirements* (May 6, 2005) (Docket  
27 W-01445A-00-0017). Just like this case, AWC never contacted the developer before filing its  
28 request to extend the deadline. AWC simply submitted something it thought sounded reasonable,



1 without any regard to the true underlying facts. Such an approach to regulatory compliance is  
2 lackadaisical at best.

3 In the second case involving Voyager Water Company (Decision 64406), the Commission  
4 was asked to approve the extension of a deadline for filing the developer's certificate of  
5 designation of assured water supply and approvals to construct for two new developments (Docket  
6 W-02104A-01-0742). Development in that case was delayed because the landowners filed to  
7 rezone their property shortly after the Commission issued its decision approving the extension of  
8 Voyager's CC&N. Again, while there was a delay in development, there is no evidence in the  
9 docket of a lack of necessity for water service.

10 In the third case, Eagletail Water Company filed an application to extend its CC&N to  
11 include approximately 15 customers who were being served by the company outside of its  
12 certificated area. The company sought clarification regarding the Commission's requirement in  
13 Decision 65277 that it file applicable municipal franchise agreements within 365 days of the  
14 decision (Docket W-03936A-01-0966). Clearly there was a demonstrated need for water service  
15 in the Eagletail case as the company was actually providing water service to the customers. None  
16 of the cases cited by AWC are controlling or in any way relevant to this case because none  
17 addressed a case of changed circumstances where there was no longer a necessity for water  
18 service.

19 Careful analysis of the facts underlying this case supports the conclusion that AWC's  
20 request for an extension of the deadline for compliance with respect to the Cornman Tweedy  
21 Property should be denied.

22 **B. AWC HAS RECEIVED THE REQUIRED DUE PROCESS IN THIS CASE.**

23 AWC includes in its Post-Hearing Memorandum a section asserting that due process  
24 requires notice and an opportunity to be heard before AWC's conditional CC&N rights are  
25 declared null and void. *Post-Hearing Memorandum* at 19, lines 11-13. The inclusion of this  
26 section is truly perplexing in light of the fact that AWC has had a hearing in this case. While  
27 Cornman Tweedy argued previously in this docket (and still maintains) that the "null and void"  
28 language of Decision 66893 is lawful and enforceable, and that AWC's failure to timely satisfy

the conditions attached to Decision 66893 rendered the decision null and void without the need for any additional action by the Commission, the Commission's Chief Administrative Law Judge rejected this argument and set the matter for hearing.<sup>3</sup> See *Procedural Order* dated March 22, 2006, at 6, lines 3-10. As a result, AWC has now had actual notice, engaged in discovery, pre-filed testimony, participated in a hearing, and briefed the legal issues. In addition, AWC will have an opportunity to address the Commissioners once a recommended opinion and order is prepared and docketed for consideration. AWC's arguments regarding its due process right to notice and a hearing as set forth in Section II(B) of its Post-Hearing Memorandum are moot in light of the fact that AWC has had its due process.

Pursuant to A.R.S. §40-252, "[t]he commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it." With due process clearly given, and on grounds of changed circumstances which are uncontroverted in this case, the Commission may deny AWC's requested extension of the compliance deadline of Decision 66893 with respect to the Cornman Tweedy Property. The effect of such a denial will be the exclusion of the Cornman Tweedy Property from AWC's conditionally certificated territory, which is warranted in light of the fact that there is no present necessity for water service to the property.

AWC argues in footnote 7 of its Post-Hearing Memorandum that "allowing the CCN Decision to be altered as requested by Cornman Tweedy is ... outside the scope of this proceeding, which is limited to the question of whether an extension of time should be granted to Arizona Water Company." *Post-Hearing Brief* at 22, fn 7. This is nonsensical. If the extension of the deadline for compliance in this case is not granted, then the natural consequence of that decision is that Decision 66893, or the relevant portion thereof, is null and void. For the reasons set forth above, this Commission may lawfully take such action pursuant to A.R.S. § 40-252.

<sup>3</sup> Cornman Tweedy's position on the legal effect of the "null and void" language of Decision 66893 is briefed in Cornman Tweedy's December 19, 2005, Response to Staff's Legal Memorandum dated November 22, 2005, in this docket, and Cornman Tweedy's December 19, 2005, response is incorporated herein by this reference. In order to preserve this issue for appeal, Cornman Tweedy continues to assert that the Commission may legally include self-executing language which renders a conditional CC&N null and void without further action by the Commission in the event that the condition or conditions underlying the decision are not timely met, or extended upon proper request timely approved by the Commission.

AWC has made assertions that "vested rights" principles apply to this case, and Cornman Tweedy is compelled to rebut these erroneous assertions even though the arguments raised by AWC regarding notice and an opportunity to be heard are now moot in light of the hearing that has been concluded in this case. AWC cites *Russell v. Sebastian* and *City of Mesa v. Salt River Project Agricultural Improvement and Power District* to further its due process argument and to question the validity of Staff's reliance on *U S West Communications, Inc. v. Arizona Corporation Commission*. However, neither of these cases support AWC's position in this proceeding. First, neither *Russell* or *City of Mesa* discuss due process requirements. Instead both cases involve public utilities which made substantial investments in providing service for several years, and the government attempted to dispossess them of those investments by either adopting a city ordinance which interfered with the utility's contracts or asking the utility to stop providing service and abandon its facilities without just compensation. *Russell*, 233 U.S. 195 (1914); *City of Mesa*, 92 Ariz. 91, 373 P.2d 722 (1962). Second, neither *Russell* or *City of Mesa* are at odds with *U S West*. The *U S West* decision came 85 years after *Russell* and 37 years after *City of Mesa*. The *U S West* court also does not engage in a due process analysis, but explicitly finds that a CC&N does not create a contract with the State and the public utility. Thus, neither *Russell* nor *City of Mesa* offers any helpful insight in furthering due process requirements.

Staff has previously rebutted AWC's arguments regarding vested rights, stating as follows:

Arizona Water broadly asserts that it has a "vested property right" protected by its CC&N contract with the State. [T]here is no CC&N contract, and hence no contract right protecting a vested property interest in this case. Monopoly regulation is a public policy, not a property right. [Case citations omitted.]

*Staff's Reply Pursuant to the November 23, 2005 Procedural Order* at 2-3 (Jan. 9, 2006).

Cornman Tweedy agrees with Staff that the approval of a conditional CC&N to AWC did not create any vested property right in AWC, and that the Commission may deny its request to extend the compliance deadline with respect to the Cornman Tweedy Property.

1           C.     **THERE IS NO BASIS TO EXCUSE OR DISCHARGE THE CONDITIONS**  
2               **OF DECISION 66893.**

3           AWC is grasping at straws with its misplaced reliance on contract principles to shore up  
4           its argument that the conditions of Decision 66893 should be legally excused. *Post-Hearing*  
5           *Memorandum* at 2, line 9. AWC argues that the approval of a conditional CC&N should be  
6           characterized as a contract between the State and the utility, resulting in a vested property right  
7           for the utility, and that a person or entity requesting service from the utility becomes a party to  
8           that contract, or alternatively, a third-party beneficiary. *Post-Hearing Memorandum* at 23, lines  
9           18-22, and 24, lines 7-11. This argument and the cases cited by AWC are wholly inapplicable to  
10          this proceeding.

11          Staff previously addressed and roundly rejected AWC's contract argument and the  
12          purported authority cited by AWC, concluding unequivocally that "[t]he granting of a CC&N  
13          [much less a conditional CC&N] does not create a contract between the utility and the State.  
14          *Staff's Reply Pursuant to the November 23, 2005, Procedural Order* (Jan. 9, 2006) at 2. Staff  
15          explained:

16               In *US West Communications, Inc. v. Arizona Corporation Commission*, 197 Ariz.  
17               16, 3 P.3d 936 (App. 1999), U S West argued to the Arizona Court of Appeals  
18               that the Arizona Corporation Commission ("Commission") had breached a  
19               contract with the telecommunications company. The Court pointed out that there  
20               was no contractual relationship between U S West and the Commission, and that  
21               U S West has "cited no authority that holds that there is an actual contract or that  
22               contract remedies are available under these circumstances." *Id.* at 22, 3 P.3d at  
23               942. The Court went on to point out that in the relationship between U S West  
24               and the Commission there was no bargained-for exchange and no term to the  
25               supposed contract. *Id.* Similarly, in this case, there was no bargained-for  
26               exchange between the Commission and AWC.

27               In *Phelps Dodge Corporation v. Arizona Electric Power Cooperative, Inc.*, 207  
28               Ariz. 95, 121, 83 P.3d 573 (App. 2004), the Arizona Court of Appeals ruled that  
the electric competition rules promulgated by the Commission did not impair the  
contract rights of electric cooperatives. The Court distinguished a CC&N from a  
traditional contractual relationship. There are no contractual rights "to generate  
the electricity that is ultimately transmitted and sold for public use" or to  
"exclusively sell electricity." *Id.* **In this case, since there is no contractual  
relationship between AWC and the Commission, the standard remedies  
related to contract law are not available. Thus, Arizona Water's arguments  
that extend contract law principles to Cornman Tweedy's position are not**

1 compelling. Similarly, its arguments related to "forfeiture" under contract law  
2 are without merit.

3 Arizona Water broadly asserts that it has a "vested property right" protected by its  
4 CC&N contract with the State. As noted above, there is no CC&N contract, and  
5 hence no contract right protecting a vested property interest in this case.

6 Monopoly regulation is a public policy, not a property right.

7 *Staff's Reply Pursuant to the November 23, 2005, Procedural Order* (Jan. 9, 2006) at 2-3  
8 (emphasis added).

9 Cornman Tweedy fully concurs with Staff that Decision 66893 did not create a contractual  
10 relationship between the Commission and AWC, or between AWC and Cornman Tweedy. A  
11 contract is formed through an offer, acceptance, consideration, and sufficient specification of  
12 terms. *US West*, 197 Ariz. at 23, 3 P.3d at 943. With no bargained-for exchange and no  
13 specified duration of the relationship, there can be no contract. *Id.* "Simply because in dicta the  
14 regulated monopoly arrangement has been likened to a contract does not mean a contract was  
15 created." *Id.*

16 Because contract principles do not apply in this case, the contract cases cited by AWC are  
17 irrelevant and inapplicable, as are the referenced provisions from the Restatement (Second) of  
18 Contracts. Thus, AWC is left without any legal support for its assertion that the conditions of  
19 Decision 66893 should be deemed excused or satisfied under a contract analysis. The *US West*  
20 and *Phelps Dodge* cases are good law today, and they properly dispose of AWC's contract  
21 arguments.

22 Two other points merit brief discussion on this issue. First, even if contract analysis did  
23 apply in this case (which it does not), there is not now nor has there ever been any contractual  
24 relationship—implied or express—between AWC and Cornman Tweedy. The facts are  
25 uncontroverted that (i) Cornman Tweedy has never requested water service from AWC; and  
26 (ii) Cornman Tweedy has never executed a main extension agreement with AWC. Thus, the  
27 bargained-for exchange which is an absolute prerequisite to a finding that a contract exists is non-  
28 existent. No doubt keenly aware of this fatal flaw in its argument, AWC asserts that "[u]pon  
acquiring Florence Country Estates, Cornman Tweedy stepped into the shoes of that developer."

1 *Post-Hearing Memorandum* at 24, lines 22-23. However, the prior owners of the Florence  
2 County Estates property did not have a contract with AWC either. Thus, there was literally  
3 nothing for Cornman Tweedy to "step into" when it acquired the Florence Country Estates  
4 property.

5 Second, AWC asserts *ad nauseam* throughout its brief that Cornman Tweedy has  
6 "frustrated" and "subverted" its efforts to comply with the conditions of Decision 66893, and that  
7 Cornman Tweedy has not acted in good faith. AWC reaches these conclusions because (i) no  
8 main extension agreement has ever been executed between AWC and Cornman Tweedy; and (ii)  
9 Cornman Tweedy has never secured a certificate of assured water supply for the Cornman  
10 Tweedy Property. However, these facts are not the result of any intentional effort by Cornman  
11 Tweedy to thwart AWC's compliance with Decision 66893, but the result of changed  
12 circumstances which has delayed indefinitely the development of the Cornman Tweedy Property.

13 The records in this case supports each of the following uncontroverted facts:

- 14 • Cornman Tweedy made a business decision that it would not develop the Cornman  
15 Tweedy Property for at least five years. *Rebuttal Testimony of Jim Poulos* (July 6,  
16 2006) at 4, lines 19-21 ("EJR Ranch [will] be held without activity for at least five  
17 years in order to lock in capital gains treatment"). There is no evidence in the  
18 record refuting Mr. Poulos' testimony that the Cornman Tweedy Property will not  
19 be developed for at least five years.
- 20 • All entitlement and development activities ceased for the Cornman Tweedy  
21 Property at the end of the first quarter 2006, except for limited activities that could  
22 reasonably be completed by the end of 2006. By the end of 2006, all entitlement  
23 and development activities for the Cornman Tweedy Property will cease. *Id.* at 4,  
24 lines 9-13.
- 25 • While the prior owners of the Florence Country Estates property submitted a  
26 request for service on 240 acres, there has never been a request for service on the  
27 remaining 898 acres of the Cornman Tweedy Property. *Direct Testimony of Jim*  
28 *Poulos* (June 12, 2006) at 8, lines 19-21.
- Because development of the Cornman Tweedy Property stopped, there are no  
efforts underway to obtain a certificate of assured water supply for the property or  
to prepare subdivision plans for the property. *Id.* at 9, lines 4-7.
- Cornman Tweedy cannot enter into a line extension agreement with a utility  
provider at this time because Cornman Tweedy has no subdivision plans for the  
Cornman Tweedy Property, and subdivision plans are a prerequisite to a  
determination of pipe sizes, locations and costs, which are essential elements of a  
line extension agreement under A.A.C. R14-2-406. *Id.* at 11-12.

- 1 • Neither Cornman Tweedy nor any person or entity affiliated with Cornman  
2 Tweedy required that the application for a certificate of assured water supply filed  
3 on the Florence Country Estates Property be withdrawn as a condition of Cornman  
4 Tweedy purchasing the property. *Rebuttal Testimony of Jim Poulos* (July 6, 2006)  
5 at 6, lines 16-19.
- 6 • Cornman Tweedy requested that the application for a certificate of assured water  
7 supply for the Florence Country Estates property be withdrawn because the land  
8 plan upon which the application was based was inconsistent with Cornman  
9 Tweedy's land plan for EJ Ranch. *Trans. Vol. I* at 224, lines 1-7. At the time the  
10 request to withdraw the application was made, Mr. Poulos testified that he was  
11 unaware of the conditions of Decision 66893, and thus, could not have been  
12 motivated by a desire to prevent AWC from complying with Decision 66893. *Id.*  
13 at 224, lines 8-10 and 18-20.
- 14 • Mr. Poulos testified that up until Cornman Tweedy's concluded that the AWC's  
15 conditional CC&N became null and void on April 7, 2005, for failure of AWC to  
16 satisfy the conditions of the decision, Cornman Tweedy had every intention that  
17 AWC would be the water provider for the Cornman Tweedy Property. *Trans. Vol.*  
18 *II* at 244, lines 3-12.

19 **D. AWC MISCHARACTERIZES CHANGED CIRCUMSTANCES AS**  
20 **"UNCLEAN HANDS."**

21 As the purchaser and owner of the 240-acre Florence Country Estates property and the  
22 remaining portion of the Cornman Tweedy Property, Cornman Tweedy has the right to develop—  
23 or not develop—the property according to its own plans, timetable, and business objectives. As  
24 Mr. Poulos testified, due to an unanticipated tenfold increase in the value of the Cornman Tweedy  
25 Property, Cornman Tweedy elected to table development of the property in order to obtain a more  
26 favorable capital gains tax treatment for the property. *Rebuttal Testimony of Jim Poulos* (July 6,  
27 2006) at 3, lines 24-24. As a result of that election, there is no present necessity for water service  
28 on the property. However, AWC purposefully mischaracterizes these changed circumstances,  
and attributes ulterior motives to Cornman Tweedy, accusing it of having unclean hands. There is  
nothing in the record that supports this allegation, or in the cases which AWC cites in its Post-  
Hearing Memorandum.

AWC quotes from two cases: *Dawson v. McNaney* and *Hamblin v. Woolley*. Upon closer  
review of these two decisions, neither provides any factual similarities to the present case.  
*Dawson v. McNaney* involved the case of an ex-wife suing her ex-husband for the right to half of  
real property they acquired while married. 71 Ariz. 79, 81, 223 P.2d 907, 908 (Ct. App. 1950).

1 The ex-husband argued that he owned the property as a whole, because the ex-wife quitclaimed  
2 her half of the property to him while they were married. *Id.* at 81-82, 223 P.2d at 908. The Court  
3 found that the husband did not have clean hands in acquiring the property through quitclaim  
4 because he pressured his wife to do so for the sole reason of escaping State taxes. *Id.* at 86-87,  
5 223 P.2d at 911-12.

6 *Hamblin v. Woolley* involved a dispute over water rights. 64 Ariz. 152, 167 P.2d 100.  
7 The plaintiffs in that case acquired water rights from a landowner through two quitclaim deeds.  
8 *Id.* at 154-156, 167 P.2d at 101-102. The defendants had actual and constructive notice of the  
9 plaintiffs' water rights. *Id.* at 156, 167 P.2d at 102. Notwithstanding their knowledge of  
10 plaintiffs' rights and claims, the defendants attempted to defeat plaintiffs' title by recording a right  
11 and claim to the plaintiffs' water rights. *Id.* at 159-160, 167 P.2d at 104-105. The Court found  
12 that equity barred the defendants from being able to obtain a right to the water. *Id.* Neither of  
13 these cases is at all similar to this case.

14 AWC further argues that it will be harmed from any deletion from the conditional  
15 extension area and that its long-term plans in providing water service in Pinal County will be  
16 compromised. Again, there is nothing in the record to support these statements. Rather, the  
17 evidence was clear that AWC can complete its planned (but not commenced) Florence Boulevard  
18 transmission main, which runs on the north side of the Cornman Tweedy Property. Moreover,  
19 AWC has acknowledged that it has the right to construct line extensions through another water  
20 provider's certificated area. *Trans. Vol. I* at 47, lines 15-19. AWC testified that even if the  
21 Cornman Tweedy Property is deleted from the conditional extension area, AWC still has the  
22 ability to construct the Florence Boulevard main extension. *Trans. Vol. I* at 49, lines 8-13.  
23 Further, AWC testified at hearing that it has even commenced construction of any water utility  
24 infrastructure within the Conditional Extension Area, including the Cornman Tweedy Property.  
25 *See Trans. Vol. I* at 51, lines 8-10 (indicating that AWC does not have approvals to construct for  
26 about 90% of the area).

27 Most notably, Staff did not find that Cornman Tweedy has acted in bad faith. In fact,  
28 Staff testified to the excellent reputation of the Robson-affiliated utilities as set forth above.



1 Perhaps most importantly, Staff supports Cornman Tweedy's request its property be excluded  
2 from the conditional extension area. *Staff's Opening Brief* at 3, lines 10-11 ("If the Commission  
3 grants AWC a time extension in this case, it is Staff's position that the time extension should no  
4 include the Cornman Tweedy property").

5 AWC argues that it was "kept in the dark." However, if AWC was in the dark, it was only  
6 because AWC failed to diligently pursue the satisfaction of the conditions of Decision 66893. If  
7 AWC had followed up with the developers, it would not have needed to mislead the Commission  
8 in its request to extend the deadlines for compliance, as it did in this case and in the case of  
9 Saddlebrooke Ranch discussed above.

10 E. **AWC HAS NOT COMPLIED WITH THE CONDITIONS OF DECISION**  
11 **66893 WITH RESPECT TO THE CORNMAN TWEEDY PROPERTY.**

12 In a last gasp, AWC argues that it has actually satisfied the conditions of Decision 66893,  
13 if one reads the decision "inflexibly and with blinders on." *Trans. Vol. II* at 346, lines 22. AWC  
14 cites to the ordering paragraphs of Decision 66893 which require that AWC file a copy of "main  
15 extension agreement associated with the extension area" and a copy of the "Developers' Assured  
16 Water Supply for each respective development." AWC asserts that it has now complied with the  
17 main extension requirement by filing a copy of a March 13, 2006, main extension agreement with  
18 JBC Development. *Post-Hearing Memorandum* at 28, lines 26-27. AWC argues that its physical  
19 availability determination satisfies the "Assured Water Supply" requirement. *Id.* at 29, lines 5-8.  
20 However, AWC has not fulfilled the conditions of Decision 66893, as noted by Commissioner  
21 Gleason after his questioning of AWC witness Garfield regarding the assertions: "So it seems to  
22 me that you didn't fulfill your order." *Trans. Vol. I* at 148, lines 4-5.

23 Staff made clear that Decision 66893 required AWC to file a main extension agreement  
24 and a certificate of assured water supply for each of Post Ranch and Florence Country Estates  
25 (which is now part of the Cornman Tweedy Property). Specifically, Mr. Olea testified that:

26 Staff believes that the areas of a CC&N that should be deleted are those areas for  
27 which compliance is not achieved. And in this particular case, as stated earlier, Staff's  
28 intent was that the certificate of assured water supply and main extension agreement  
should be submitted for the two developments that were part of the extension.

1 Cornman Tweedy is one of those two developments. Certain documents were not  
2 submitted in time.

3 *Trans. Vol. II* at 324, lines 15-24. Mr. Olea further clarified that although the ordering paragraph  
4 of Decision 66893 does not include the word "certificate" in front of "Assured Water Supply," the  
5 body of the order makes clear that the Commission adopts Staff's recommendation to require the  
6 filing of a certificate of assured water supply. *Trans. Vol. II* at 345, lines 8-25 through 346, lines  
7 1-15.

8 AWC never filed a main extension agreement for the Cornman Tweedy Property (or for  
9 that portion of the Cornman Tweedy Property formerly referred to as Florence Country Estates)  
10 or Post Ranch, the two developments addressed in Decision 66893. While AWC has recently  
11 submitted a certificate of assured water supply for Post Ranch, no such certificate exists for the  
12 Cornman Tweedy Property. Yet, AWC urges the Commission to deem the conditions satisfied.  
13 Mr. Olea testified that only the Commission can modify the conditions of a decision (and remove  
14 or modify compliance conditions), which has not occurred in this case per the testimony of Mr.  
15 Olea:

16 [I]n this case the order says submit a certificate of assured water supply. Staff cannot  
17 change an order that has been written by the Commission, and it has to be followed to  
18 the letter. And so the certificate of assured water supply is what is required in this  
19 case. So unless that is submitted or unless the order is amended to allow either a PAD  
20 or an analysis, Arizona Water is not in compliance with that order. . . . This  
21 Commission can change any of its past orders at An Open Meeting, and they can  
22 change that requirement to whatever they want it to be.

23 *Trans. Vol. II* at 317, lines 20-25 through 318, lines 1-3 and lines 16-18. Absent the  
24 Commission's modification of Decision 66893 to alter the conditions set forth therein, AWC  
25 remains out of compliance for Post Ranch and the Cornman Tweedy Property.

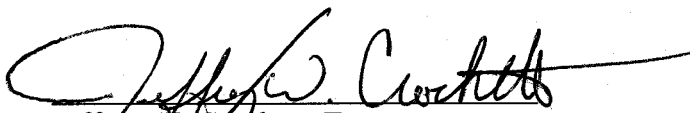
26 **V. CONCLUSION.**

27 For the reasons set forth herein, the Commission should deny AWC's requested extension  
28 of the compliance deadline of Decision 66893 with respect to the Cornman Tweedy Property.  
The record in this case makes clear that there is no necessity at this time for water service at the  
Cornman Tweedy Property. Absent such a quintessential element of a CC&N, the Commission

should not grant the requested extension. Staff clearly supports this request, as set forth in Staff's Opening Brief.

RESPECTFULLY submitted this 6th day of October, 2006.

SNELL & WILMER



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ORIGINAL and thirteen (13) copies of the foregoing have been filed with Docket Control this 6th day of October, 2006.

A COPY of the foregoing was hand-delivered this 6th day of October, 2006, to:

Teena Wolfe, Administrative Law Judge  
Hearing Division

ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

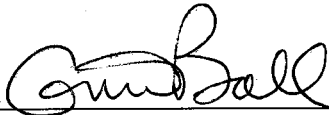
Christopher C. Kempley, Chief Counsel  
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Steve Olea, Assistant Director  
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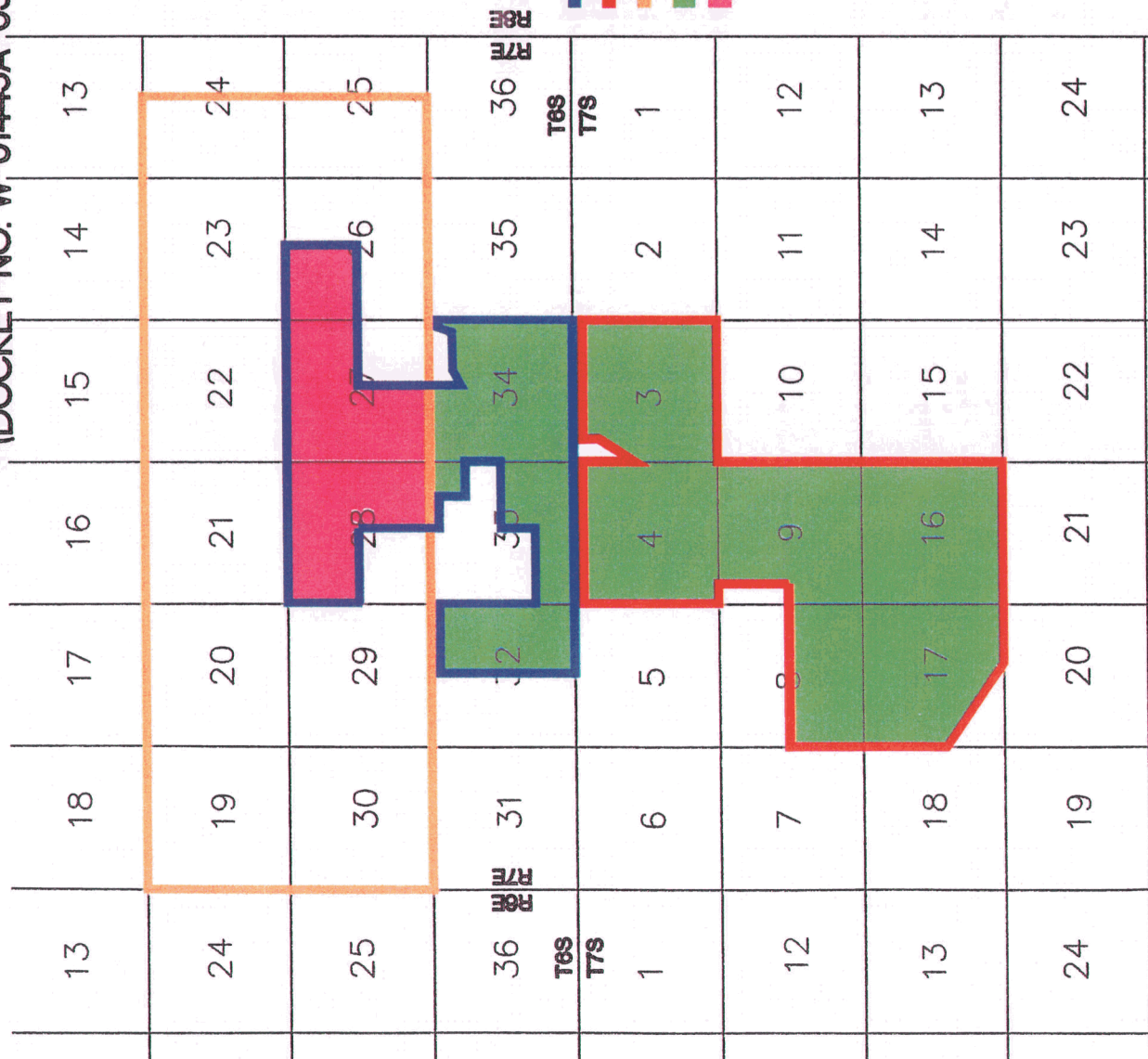
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# **ATTACHMENT A**

# ARIZONA WATER COMPANY CC&N EXTENSION (DOCKET NO. W-01445A-03-0559)



# **ATTACHMENT B**

W-04264A-04-0438, et al. VOL.

BEFORE THE ARIZONA CORPORAT:

IN THE MATTER OF THE APPLICATION  
OF WOODRUFF WATER COMPANY, INC.  
FOR A CERTIFICATE OF CONVENIENCE  
AND NECESSITY TO PROVIDE WATER  
SERVICES IN PINAL COUNTY, ARIZONA.

W-04264A-04-0438

IN THE MATTER OF THE APPLICATION  
OF WOODRUFF UTILITY COMPANY, INC.  
FOR A CERTIFICATE OF CONVENIENCE  
AND NECESSITY TO PROVIDE SEWER  
SERVICE IN PINAL COUNTY, ARIZONA.

DOCKET NO.  
SW-04265A-04-0439

IN THE MATTER OF THE APPLICATION  
OF ARIZONA WATER COMPANY, AN  
ARIZONA CORPORATION, TO EXTEND  
ITS EXISTING CERTIFICATES OF  
CONVENIENCE AND NECESSITY AT CASA  
GRANDE AND COOLIDGE, PINAL  
COUNTY, ARIZONA.

DOCKET NO.  
W-01445A-04-0755AZ CORP COMMISSION  
DOCUMENT CONTROL

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Volume VII

Arizona Corporation Commission (Pages 1235 through 1432)

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AUG 19 2005

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Prepared for:

By: Kelly Sue Oglesby, RPR  
CSR(CA), Arizona CCR No. 50178

ACC

**ORIGINAL**



W-04264A-04-0438, et al. VOL. VII 08-04-2005

1 Q. -- going over to the next page?

2 Is the last one in there their rates?

3 A. Yes.

4 Q. And Staff considered all of those factors when  
5 it was doing its balancing or weighing of the different  
6 applications?

7 A. Just like the judge said.

8 Q. And I think you told Mr. Crockett that you are  
9 familiar with Karl Polen?

10 A. Yes.

11 Q. And he has a pretty good reputation?

12 A. From the dealings here at the Commission and as  
13 far as I know in the industry, he does, yes.

14 Q. And before he was with Woodruff, he was over at  
15 the Robson companies?

16 A. Yes.

17 Q. And would it be your opinion that in terms of  
18 developer-managed water companies, Robson is sort of at  
19 the top of the list?

20 A. There is a few companies I would put up there  
21 along with Arizona Water Company, and Robson's companies  
22 would be those also.

23 Q. And I am going to get out the Volume 1 of the  
24 transcript and I am going to read you two selections of it  
25 and then ask you a question about it. And so people can